



Signed and Filed: October 07, 2010

A handwritten signature in dark ink, appearing to read "T. E. Carlson", is written over a horizontal line.

THOMAS E. CARLSON  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re	)	Case No. 09-31130 TEC
	)	
ONE VISION PARK, INC.,	)	Chapter 11
	)	
	)	
	)	
	)	
	)	
Debtor.	)	

MEMORANDUM RE MOTION FOR STAY PENDING APPEAL FILED BY  
OHAYON INVESTMENTS, LLC AND MICHAEL OHAYON

On September 10, 2010, the court held a hearing on the joint Motion filed by Ohayon Investments, LLC and Michael Ohayon for a stay pending appeal of three orders entered on July 12, 2010: (1) an order denying Ohayon's motion for reconsideration of the Order Disallowing Claim No. 22; (2) an order denying Ohayon Investment LLC's motion for reconsideration of the Order Disallowing Claim No. 36; and (3) an order denying the motion of Ohayon Investments, LLC to excuse and permit the late filing of claim no. 36. Peter W. Ito appeared for Debtor. Christopher D. Kuhner appeared for the Creditors Committee. Michael Ohayon

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1 appeared in pro per and for Ohayon Investments, LLC. Arlo Smith,  
2 an unsecured creditor, appeared in pro per.

3 Upon due consideration, and for the reasons stated below, the  
4 court denies the motion for stay pending appeal, notwithstanding  
5 the possibility of irreparable harm to Ohayon Investments, LLC and  
6 Michael Ohayon, because these claimants have a very small chance of  
7 prevailing on appeal. This memorandum shall constitute the court's  
8 findings of fact and conclusions of law.

9 **FACTS UNDERLYING CLAIM NO. 36 (FINDER'S FEE)**

10 In January 2009, Ohayon Investments, LLC (the LLC) and Debtor  
11 One Vision Park, Inc. (OVP) executed a prepetition agreement  
12 entitling the LLC to a ten percent finder's fee if the LLC  
13 introduced an investor to OVP that resulted in an investment in  
14 OVP.

15 On April 30, 2009, OVP filed a petition under chapter 11 of  
16 the Bankruptcy Code.

17 On August 4, 2009, Debtor OVP filed, and served upon creditors  
18 including Michael Ohayon, an application to employ NAI BT as  
19 Debtor's exclusive agent to market and sell Debtor's primary asset:  
20 an option to purchase 1,311 acres in Solano County (the Property).  
21 On November 10, 2009, the court signed an order granting Debtor's  
22 application to employ NAI BT as its real estate broker. The court  
23 later awarded NAI BT compensation in the sum of \$255,000 for its  
24 services regarding the sale of the Property.

25 The administrative claims bar date fixed by the court expired  
26 on December 18, 2009. On January 15, 2010, the LLC filed claim no.  
27 36, asserting an administrative claim in the sum of \$850,000<sup>1</sup> for  
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<sup>1</sup> \$850,000 is ten percent of the sale price of the Property.  
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1 allegedly finding the buyer that purchased the Property from Debtor  
2 in the chapter 11 case.

3 On June 3, 2010, this court entered an order denying claim  
4 number 36: (1) because the LLC was seeking compensation for  
5 professional services governed by section 327(a) of the Bankruptcy  
6 Code and the court had not appointed the LLC as a professional; and  
7 (2) because the court could not appoint the LLC retroactively,  
8 because the LLC was not disinterested due to the large, pre-  
9 petition claim filed against the estate by the LLC's principal,  
10 Michael Ohayon.

11 On July 12, 2010, the court entered an order denying the LLC's  
12 motion for reconsideration of the order denying claim no. 36 and an  
13 order denying the LLC's motion to excuse the untimeliness of claim  
14 no. 36, on the basis that the LLC had not established either that  
15 it failed to receive adequate notice of the bar date or that its  
16 failure timely to file claim no. 36 was the result of excusable  
17 neglect. The order denying the claim as an untimely administrative  
18 claim also allowed claim no. 36 in full as a tardily-filed general  
19 unsecured claim.

20 On July 23, 2010, the LLC filed a notice of appeal regarding  
21 the orders entered on July 12, 2010 regarding claim no. 36.

22 **FACTS UNDERLYING CLAIM NO. 22 (IMPROPER TRANSFER OF SHARES)**

23 In March 2009, Michael Ohayon (Ohayon) obtained a \$2.8 million  
24 state-court judgment against David Papera, a founder and officer of  
25 Debtor OVP. On March 13, 2009, Papera caused the Usdi Trust, a  
26 revocable trust Papera established for the benefit of his children,  
27 to transfer 5,250 OVP shares to the Walela Trust, a revocable trust  
28 created by Elizabeth Papera (David's ex-wife) for the benefit of  
Papera's son. On March 17, 2009, David Papera caused the board of

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1 directors of OVP to approve the transfer of shares from the Usdi  
2 Trust to the Walela Trust.

3 On April 22, 2009, Ohayon attempted to enforce his judgment  
4 against the OVP shares of the Usdi Trust. This enforcement effort  
5 was unsuccessful, because the Usdi Trust had already transferred  
6 the shares to the Walela Trust.

7 Ohayon timely filed claim no. 22 against Debtor OVP, seeking  
8 damages of \$2.8 million, based on the OVP board's March 13, 2009  
9 ratification of the stock transfer, which Ohayon claimed  
10 constituted participation by OVP in a fraudulent transfer of the  
11 shares by David Papera.

12 On June 3, 2010, this court entered a memorandum and order  
13 denying claim no. 22, on the grounds that Papera's transfer of OVP  
14 shares from the Usdi Trust to the Walela Trust was effective  
15 without the approval of OVP's board. The court determined that the  
16 transfer was not subject to the right of first refusal contained in  
17 Debtor's January 2005 bylaws, because in November 2008<sup>2</sup> the board  
18 had acted within its powers in adopting an exception to OVP's right  
19 of first refusal for transfers of stock from a shareholder to a  
20 trust created for the benefit of a lineal descendant of that  
21 shareholder.

22 The memorandum decision also noted that even if the OVP  
23 board's action regarding the share transfer was wrongful, the  
24 transfer caused Ohayon no damage, because at the time they were  
25 transferred, the shares were worthless. The court noted that the  
26 chapter 7 trustee in the bankruptcy case filed by David Papera had

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28 <sup>2</sup> The memorandum decision incorrectly stated that the stock-  
purchase agreement was adopted in November 2007. This mistake was  
not material to the court's decision, because the stock-purchase  
agreement was adopted prior to the share transfer in 2009.

1 filed an action to avoid the March 13, 2009 transfer, but later  
2 dismissed the action on the basis that it appeared the OVP shares  
3 had little or no value. The court also noted that the transfer  
4 occurred shortly before OVP filed its chapter 11 case, that OVP's  
5 assets have been liquidated in that case, and that the proceeds of  
6 those assets are insufficient to pay claims, leaving no estate  
7 assets to distribute to shareholders.

8 **LAW**

9 Federal Rule of Civil Procedure 8005 provides in relevant part  
10 that a "bankruptcy judge may suspend or order the continuation of  
11 other proceedings in the case under the Code or make any other  
12 appropriate order during the pendency of an appeal on such terms as  
13 will protect the rights of all parties in interest." To obtain a  
14 stay pursuant to Rule 8005, the appellant must prove: (1) a  
15 likelihood of success on the merits of the appeal; (2) irreparable  
16 injury absent the issuance of a stay; (2) no substantial harm to  
17 the appellee if a stay is issued; and (4) no harm to the public  
18 interest as a result of issuance of a stay. In re Irwin, 338 B.R.  
19 839, 840 (E.D. Cal. 2006). The appellant bears the burden of  
20 proving these four elements. Id.

21 (1) Likelihood of success on the merits

22 (a) Claim No. 36

23 The LLC has an exceptionally small chance of establishing an  
24 administrative priority claim for a finder's fee, because such a  
25 fee is payable only to a professional appointed by the court,  
26 because the LLC had not been appointed by the court as a  
27 professional. The court declined to appoint the LLC as a  
28 professional retroactively because the LLC was not disinterested,

1 and because the court had already appointed a real estate broker to  
2 perform the substantially the same services offered by the LLC.

3 The LLC also has an exceptionally small chance of establishing  
4 that its claim should be treated as a timely filed general  
5 unsecured claim, because the LLC's principal received adequate  
6 notice of the general unsecured claims bar date.

7 (b) Claim No. 22

8 Ohayon has only a small chance of establishing the merits of  
9 his conspiracy claim, because OVP's board of directors acted in  
10 conformity with the governing bylaws in authorizing the family-  
11 transfer exception to the restriction on share transfers, and  
12 because the share transfer at issue came within that family-  
13 transfer exception. Even if an appellate court were to conclude  
14 that this court's interpretation of the bylaws were unsound,  
15 however, Ohayon will not be able to prove damages caused by the  
16 share transfer, because the transfer occurred shortly before OVP  
17 filed its bankruptcy petition, and because the bankruptcy case has  
18 shown the shares to have no value. Thus, Ohayon was deprived only  
19 of the right to attach worthless shares of stock.

20 (2) Irreparable Injury

21 If the LLC and Ohayon were to establish entitlement to an  
22 administrative priority claim and entitlement to damages caused by  
23 the alleged conspiracy, the absence of a stay pending appeal would  
24 cause the LLC and Ohayon irreparable harm, because the appeal would  
25 be moot. Because of the possibility of irreparable harm, this  
26 court ordinarily would stay the distribution on other claims  
27 pending resolution of the appeals regarding the Ohayon and LLC  
28 claims. The court declines to issue a stay in this case due to the  
extreme weakness of the administrative claim, the weakness on the

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1 merits of the conspiracy claim, the exceptionally weak case for  
2 damages on the conspiracy claim, the large dollar amounts of the  
3 administrative and conspiracy claims (\$3.65 million), and the  
4 substantial resulting harm to creditors with allowed claims that  
5 would be caused by a delay in the distribution on their allowed  
6 claims.

7 (3) Balance of Hardships

8 Balancing the mootness of the appeal against the delay in  
9 payment to holders of allowed claims, the court determines that the  
10 delay in payment to holders of allowed claims is not justified  
11 where the merits of the appeal are so weak.

12 (4) Public Interest

13 The only significant public interest in this case is the  
14 prompt payment of legitimate claims, and does not weigh in favor of  
15 a stay pending appeal.

16 **\*\*END OF MEMORANDUM\*\***

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